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Supreme Court of the United States

OCTOBER TERM, 1951

No. 343

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1111,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1113,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

United Electrical, Radio and Machine Workers of America, (UE) Local 1113, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on May 26, 1955.

Opinions Below

The opinion of the Court below (App. B, infra, pp. 36 to 46) is not yet reported. The Decision and Order of the National Labor Relations Board and the Intermediate Report and Recommended Order are reported at 106 NLRB 1171, and incorporated at pages 123-208 of the Joint Appendix printed for use of the Court below and filed here.[1]

[1] Page references to the Joint Appendix printed below and filed here are preceded by the letters "J.A." Page references to the unprinted record are preceded by the symbol "Tr." The General Counsel's exhibits at the hearing are designated "G.C."

Jurisdiction

The judgment of the Court below was entered on May 26, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 and Section 10(f) of the National Labor Relations Act as amended.

Questions Presented

1. Whether under the "cooling off" provisions of Section 8(d) of the National Labor Relations Act a party to a collective bargaining agreement may terminate its contract after the other party's breach and discontinue terms and conditions of the existing contract without giving the notices required by Section 8(d) when the other party to the contract has previously sought to obtain mutual agreement to the incorporation of new provisions in the contract during its term without giving the notices required by Section 8(d)(3).

2. Whether under the National Labor Relations Act and the Due Process clause of the Fifth Amendment, a union member who is not shown to have authorized or actually participated in a work stoppage in breach of contract found to have been caused by his union leadership may nonetheless be held to be a participant in that stoppage solely because of his union membership, unless he affirmatively disprove his authorization of, participation in, or ratification of the stoppage.

3. Whether under Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act an employer may require its employees affirmatively to accept the employer's conditions of employment which are illegal under Sections 8(a)(1) and 8(a)(5) of the Act in order to retain their jobs.

4. Whether under Section 8(a)(5) of the Act, an employer may refuse to meet with and bargain collectively with the union representing its employees until it receives notice of the termination of a stoppage found to have been caused by the union in breach of contract.

5. The Court below held that the Union, by asking for a meeting on the Employer's lockout of its employees, had not given adequate notice to the Employer of the termination of a stoppage it found to be in breach of contract, and that the Employer was not obligated to bargain with the Union on that day. On the morning of the following day a substantial majority of the employees represented by the Union appeared at the plant gates ready for work, but were rejected. The Employer still failed to bargain with the Union. The following question is presented:

Whether under Section 8(a)(5) of the Act, an employer may refuse to meet and bargain with a union then qualified as the collective bargaining representative of its employees because the request for collective bargaining made the day before when the union was found not to have been entitled to act as collective bargaining representative under the Act was not reiterated when the union became qualified.

6. Whether the evidence supports the finding that the Employer was not put on notice on February 28, 1952 of the termination of the stoppage.

7. (a) Whether the evidence supports the finding that the Employer discharged the participants in the stoppage here and refused to recall the laid-off employees because of their union membership.

(b) Whether an employer may discharge its employees because of their union membership when they have engaged in a work stoppage found to be in violation of Section 8(d) of the Act.

Statutes Involved

The statutory provisions involved, Sections 7, 8(a)(1), 8(a)(3), 8(a)(5) and 8(d) of the National Labor Relations Act as amended, 61 Stat. 136, *et seq.*, 29 U. S. C. 151, *et seq.*, appear in Appendix A, *infra*, at pp. 33 to 35.

Statement of the Case

A. The Facts

The Events Prior to February 29, 1952.

On July 31, 1951, the Marathon Electric Manufacturing Company (herein called the Employer) entered into a one year collective bargaining agreement with an unincorporated labor association, United Electrical, Radio and Machine Workers of America, Local 1113 (herein called the UE), the recognized representative of its employees at its Wausau, Wis. plant. This contract contained, among other provisions, a union recognition clause (Art. I, J.A. 116), a union shop clause requiring all employees to become and remain members of the UE (Art. II, J.A. 116), a seniority clause providing that laid off workers should retain preference for purposes of hiring for a period of two years (Art. V, J.A. 120), and a no-strike, no-lockout clause permitting the discharge of workers (subject to subsequent arbitration) who deliberately took part in a violation of that clause (Art. XII, J.A. 122).

The contract further provided for a 9¢ an hour wage increase, subject to any necessary approval of the Wage Stabilization Board (Art. X, J.A. 121). Subsequently, it was discovered that under existing WSB regulations and policies only 7¢ of the wage increase could be put into effect. The UE then entered into negotiations with the Employer seeking to have the remaining 2¢ an hour put into effect in the form of "fringe benefits" acceptable to the WSB under

its regulations and policies (J.A. 99-103). The Employer voluntarily entered into discussions of various such proposals, but finally on February 27, 1952, took the position that it would not put the 2¢ increase into effect in any way (J.A. 96).

On February 22, 1952, at a membership meeting of the UE, the taking of a strike vote was authorized by a secret ballot. Five or six members voted against the strike vote proposal (Tr. 1194). The record does not disclose the number of people attending the meeting or (in the main) their identity.

The Events of February 28, 1952, The Work Stoppage, The Locking of the The Gates, and The Termination of The Work Stoppage.

On the morning of February 28, 1952, the day following the Employer's rejection of all proposals for putting the 2¢ increase into effect, the Union officers and stewards met and voted to call a full membership meeting at 2:00 o'clock that afternoon (Tr. 31-32). On that date, the Employer employed approximately 480 workers on the first shift, 60 on the second shift, and 10 on the third shift. In addition, a large group of workers were on layoff status entitled to seniority preference in hiring. At 2:00 P. M., one hour before their regular quitting time, 445 first shift employees of the Employer who were in the plant left the plant to attend the Union meeting.

At about 2:30 P. M., the Employer locked the plant gates, the traditional signal that the plant was not operating (Tr. 139-141). News of this action reached the Union meeting about 3:00 P. M. After this announcement and some further discussion, the Chairman directed the employees to report for work at their regular times and continue to report until told otherwise, an instruction which was followed until March 4 (Tr. 38, 79-80).

The Employer's Refusal to Bargain on February 28 and February 29, 1952. The Discharge of All Employees on February 29, 1952.

On February 28, 1952, the Employer's President resolved that he would never deal or bargain with the UE again (J.A. 108).

In the late afternoon of February 28, 1952, subsequent to the ending of the work stoppage, the UE bargaining committee contacted the Employer's Factory Manager by telephone and asked him to arrange a conference for the return of the employees. Its call was never returned (J.A. 16).

On the morning of February 29, 1952, after the employees appeared for work at the plant gate the Employer neither opened the gates so that they might return to work nor returned the UE's call of the evening before. Instead it published the following statement as an advertisement in the local paper and mailed a copy to each of its 550 employees on the active payroll:

> "At 2 P. M. on February 28, 1952, the Factory employees of Marathon Electric Manufacturing Corporation voluntarily left their jobs in violation of an agreement which was in existence between the Union and the Company. This agreement provided that 'THE UNION WOULD NOT AUTHORIZE OR SANCTION ANY STRIKE, STOPPAGE, SLOW-DOWN OR RESTRICTIONS OF OUTPUT AND IN ANY CASE ANY SUCH ACTION SHOULD OCCUR, ANY OR ALL OF THE EMPLOYEES TAKING PART WOULD BE SUBJECT TO DISCHARGE.' Since the action taken by the Union and its members Thursday afternoon was the second such violation resulting from irresponsible leadership, the Company has no alternative but to consider that all participants have forfeited any rights as employees and are accordingly being removed from the Company payroll. This means that all employee benefits such as group insurance, vacation plans, holiday pay plans, etc., are being eliminated immediately.
>
> "Since the present Union leadership has seen fit for the second time to dishonor written agreements, the Company feels it useless to deal with any such repre-

sentatives of the employees. The Company will only deal with responsible representative groups of employees in the future."

The Termination of the Contract. The Failure to Recall the Laid-off Employees, and the Continuing Refusal to Bargain.

On March 5, 1952, the Employer wrote to the Union terminating the contract and informing it that since all employees who took part in the work stoppage were discharged, UE no longer represented a majority of the employees and the Employer would no longer recognize it as the bargaining agent (J.A. 169-170). A similar letter was sent to all employees on the active payroll (with the exception of union officials) asking them to apply for work as new employees (J.A. 168-169). The Employer did not send the sixty-day notice to the Union and the thirty-day notices to the Conciliation services required by Section 8(d) of the Act. Prior to February 28th the Union did not send the notices to the Conciliation services required by 8(d)(3) of the Act.

On March 3rd, the Employer advertised for new employees (J.A. 168) and on the following day, the Union commenced formal picketing which continued for at least several months. At no time did the Employer recall any of the laid-off employees under the contract procedures.

On March 27th, the Union wrote the Employer asking negotiations to iron out their differences. No reply was made to this letter, and similar overtures from the Union were either unanswered or rejected, including an offer on April 15, 1952, to submit the discharges to arbitration under the contract (Tr. 55-60).

The Non-Participants in the February 28th Stoppage.

Of the some 550 employees, approximately 100 did not leave their work to attend the Union meeting. None of these (except for four UE stewards) are shown to have

participated in the stoppage of February 28th, or taken part in either the meeting of February 22nd which authorized the taking of a strike vote, or the meeting of officers and stewards on February 28th which voted to call the full membership meeting later that day.[1a]

The record shows affirmatively that 23 of the workers listed above did not attend the union meeting.[2] Twelve employees—mainly second-shift workers who had found the gates locked—did.[3] There is no evidence in the record that any of the remaining 45 employees who were not in the plant at 2 P. M. on February 28th attended the meeting—or knew of it.

[1a] The record with regard to this group stands as follows:

1) Thirteen employees were absent because of illness and injuries incapacitating them for periods ranging until April 1, 1952 (Tr. 176-178, 441-444, 521-525, 803-805, 816-824, 843-852, 944-947; G.C. Exh. 4, Tr. 44).

2) Twenty-five first-shift employees were either absent all of February 28th or excused from work prior to 2 P. M. on that day (Tr. 136-166, 375-394, 356-368, 453-474; G.C. Exh. 4, Tr. 44).

3) Fourteen workers were not scheduled to report for work until after the locking of the gates became generally known in the community (Tr. 780; G.C. Exh. 4, Tr. 44).

4) Thirteen second-shift workers are affirmatively shown to have reported for work prior to 3 P. M. on February 28th and to have found the gates locked. Three second-shift workers are shown to have been in the vicinity of the plant shortly before 3 P. M. (Tr. 166-171, 444-450, 474-477, 506-517, 526-539 556-564, 622-641, 736-747, 795-802, 805-814, 857-874, 1385; Tr. 476).

5) There is no evidence whatsoever concerning the activities of 32 second-shift workers.

6) Three second-shift workers are shown to have attended the meeting rather than reporting for work (Tr. 781, 1236).

[2] Tr. 138, 147, 160, 187, 204, 357, 376, 394, 441-442, 512, 524, 528, 558, 582, 611, 804, 817, 845, 846, 860, 945, 973.

[3] Tr. 448, 441, 627, 746, 779, 808, 870, 989, 1181, 1236.

B. The Decisions Below

On the basis of these facts, the Trial Examiner found as follows:

1) The discharge of the non-participants on February 29th, and the failure to recall the laid-off employees was discriminatory and violated Section 8(a)(1) and 8(a)(3) of the Act. He excluded from this group, however, the 32 second-shift employees concerning whom no evidence was introduced (J.A. 148-155).

2) The Employer had refused to bargain with the Union on and after February 28th, in violation of Sec. 8(a)(1) and 8(a)(5) of the Act (J.A. 158-160).

3) The Employer had committed other violations of Sec. 8(a)(1) and 8(a)(2) of the Act after March 5th (J.A. 160-162).

The Court below, upon petition by the charging party from the Board's decision, upheld the reversal of these findings by the National Labor Relations Board on the following grounds:

1) The evidence supported the finding by the Board that all the employees were participants in the stoppage because they had all "acquiesced in, ratified and become parties to their agent's action" by taking no steps after the UE's action had ceased and after their discharge to indicate they were not participants. This evidence upon which the Court below relied is summarized by the Board as follows (J.A. 193-195):

> a) The non-participants were members of a "strong and militant" local of UE. The record is silent as to any showing of dissent on their part prior to the walkout which was joined in by all the employees in the plant at the time.

b) None of the non-participants made any attempt to dissociate himself from the walkout after the Employer's letter of February 29th discharging them.

c) "Many" of the second-shift workers upon finding the plant gates locked went to the Union meeting.

d) The testimony of 11 of 31 non-participants at the hearing (which the Board described as a "sampling") was in effect that they would not have accepted any offer of reinstatement which did not include all the employees.

e) "Many" of those reporting for work on their regular shifts after the meeting did so as part of a "tactical manoeuvre."

2) The termination of the contract and cancellation of its provisions on February 29th and March 5th was not a violation of 8(d) of the Act which forbids such action absent sixty days notice, since UE itself had sought in negotiations to modify the existing contract without giving the thirty day notice to the conciliation services required by 8(d)(3).

3) The Employer did not refuse to bargain apart from the provisions of 8(d) by refusing to bargain with the UE. On February 28th the Employer had no notice of the termination of the walkout, and the UE was not entitled to the "privileges" of the Act (App. B, p. 45), and on March 27th when the next bargaining overture was made by the UE, UE no longer represented a majority of a substantial complement of the plant employees.

4) The evidence supported the Board finding that the Employer's failure to recall the laid-off workers and the discharge of the participants in the stoppage was not discriminatory in motive. In any event, the employee's violation of 8(d) freed the employer to discriminate against them because of their union membership.

Reasons for Granting the Writ

1. This petition brings before this Court important issues under the Act and going beyond its scope, involving the proper conduct and the rights, duties and status of employers, unions and employees in the period surrounding the breach of the no-strike clause of a collective bargaining agreement. Over 89% of all Union contracts contain no strike, no lockout agreements.[4] Although exact statistics are unavailable, it is a matter of industrial history that strikes and lockouts during the term of such contracts do occur. The issues here raised thus can affect almost every industrial worker in the country in his relations with his union and with his employer (either directly or through his union).

The impact of the decision below on the employer-employee-union relationship is particularly severe by reason of the drastic changes in basic rights and duties consequent to the breach of no strike, no lockout clause which it sanctions. For the employee the decision below raises vital questions of proper personal conduct in a period where a misstep may cost him his rights under the Act, bring about his discharge, and condemn him to the economic scrap heap. For unions and employers it raises the question of how—if at all—they may seek to adjust or refuse to adjust their contracts to changes in circumstances during the contract term and the remedies of which they may avail themselves. For all parties it raises the question of the meaning and extent of the duty to bargain during the period around a stoppage in breach of contract, the facts which give rise to this duty and how—if at all—an employee may lose his personal right to bargain collectively through representatives of his own choosing while retaining his employee status.

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[4] Bureau of National Affairs, *Collective Bargaining and Contract Negotiations Manual*, 12:325.

The decision below, resting in the main upon the Board opinion, now stands as an authoritative judicial sanction for the approach of the "new Board" in the interpretation of the Act. As Professor Willard Wirtz has recently pointed out in discussing the decisions of this Board in another area,

> "• • • what has in fact happened is that even as the 83rd Congress has been proving itself again unable to agree on even minor amendments to the Act, the new NLRB—manned suddenly by a majority made up of three new appointees—has proceeded to 'reinterpret' the Act in such a manner as to change its practical application substantially beyond anything seriously considered in recent Congresses." [5]

The decision below is important not only because of the sanction it grants to the new legal principles established by the Board, but because of its sanction of the new Board's approach to the evaluation of evidence in unfair labor practice charges against employers. The ultra-strict requirement which the decision establishes for proof of discriminatory intent coupled with the hypertechnical approach taken to the facts necessary to create a duty to bargain and to find a refusal to bargain, create precedents and guides which easily enable an anti-labor employer to destroy with impunity the protections which the Act establishes for his employees.

The 8(d) Questions.

2. The requirements of the Section 8(d) proviso depart from the general scheme of the Act that terms and conditions of employment should be settled by free collective bargaining. The section imposes certain special restrictions on the bargaining process where a contract is in existence, including severe restrictions upon employees in the use of their basic weapon of collective bargaining and self-

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[5] Wirtz, *The New National Labor Relations Board; Herein of Employer Persuasion*, 49 Northwestern U. L. Rev. 594 (1954).

defense—the right to strike. Employees who strike in violation of its restrictions lose their status under the Act as employees of their employer.

Ascertainment of the meaning of the 8(d) proviso and the nature and extent of its restrictions is plainly of extreme importance to all employees and their employers. Their relationship is normally governed by contract and they must seek their adjustments of those relationships by adjustment of the contract without the risk of unfair labor practices and with knowledge of the results attached to such unfair labor practices, and must draft their contracts accordingly. This Court has already granted certiorari to review the similar question of whether or not an unfair labor practice of one party frees the opposing party to take economic action during the cooling off period. *Mastro Plastics* v. *NLRB*, October Term, 1955, No. 19, certiorari granted 348 U. S. 910. The Board itself has recognized that the restriction placed by 8(d) upon the right to strike are of "manifest importance in the scheme of the Act." (Petition for certiorari, *NLRB* v. *Lion Oil Co.*, No. ——, Oct. Term, 1955, p. 6.) The related question here presented, raising as it does the problems of when in the contract relationship and under what circumstances the proviso shall apply, is equally important.

Conflicts in the decisions of the Board itself and between the Board and Courts of Appeals as to the meaning and intention of the 8(d) proviso emphasize the importance of a resolution of the problems it raises. Of the nine Board members who have passed upon the proviso, four have held that the 8(d) proviso permitted a party to a contract to use economic action to secure modification of an agreement, at any time during a contract term, provided the required notices were given.[6] Two members have held that the proviso was intended to apply only to the period around

[6] Members Houston, Reynolds and Styles in *United Packinghouse Workers of America*, 89 NLRB 310, Member Peterson in *Lion Oil Co.*, 109 NLRB 680.

the termination of a contract and that the parties were not restricted in seeking modification of the agreement at any other time.[7] Three members have held that the proviso only permitted economic action either at the termination of a contract, or at a time when the contract itself envisaged modification.[8] Three members have held that economic action directed at unfair labor practices is not included within the scope of the proviso.[8a] Two members have held that the proviso does reach that action.[9]

The Court of Appeals for the Eighth Circuit has held that the proviso forbids all economic action absolutely during the life of an agreement.[10] Two judges of the Court of Appeals for the Second Circuit recognized a possible disagreement with the Eighth Circuit in holding that economic action to protect unfair labor practices is forbidden by the proviso.[11] A third Judge has adopted the rationale of Board Chairman Herzog and Board Member Murdock that 8(d) applies only during the period around the termination of an agreement, but permits of no exception when it does apply.[12]

The Court below has adopted a new position holding that the 8(d) proviso applies to all modifications of contract

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[7] Chairman Herzog and Member Murdock in *United Packinghouse Workers of America, supra,* and *Mastro Plastics Corp.,* 103 NLRB 511, Member Murdock in *Lion Oil Co., supra.*

[8] Chairman Farmer, Members Rodgers and Beeson in *Lion Oil Co., supra.*

[8a] Members Houston, Stiles and Peterson in *Mastro Plastics Corp., supra.*

[9] Chairman Herzog and Member Murdock in *Mastro Plastics Corp., supra.*

[10] *Local No. 3 UPWA* v. *NLRB,* 210 F. 2d 325, cert. den. 348 U. S. 322; *Lion Oil Co.* v. *NLRB,* 221 F. 2d 231.

[11] Judges Chase and Frank in *NLRB* v. *Mastro Plastics Corp.,* 214 F. 2d 462.

[12] Judge Swan dissenting in *NLRB* v. *Mastro Plastics, supra.*

during the contract term. It holds even a request for modification by mutual agreement an unfair labor practice unless the notices required by the proviso be given and that under the circumstances herein employer might exert economic pressures upon his employees without regard to the limitations which 8(d) places upon the termination of an agreement, if only an employer might discover a prior violation of 8(d) by the union.

3. The Employer's termination of the contract here—standing alone—would violate plainly the requirements of 8(d). Section 8(d) was concerned with preserving industrial peace and mitigating industrial disputes during the times around the termination of an agreement by providing for a bargaining period when recourse to industrial warfare was forbidden both parties and when the help of the designated conciliation services should be available. The reported cases, including the 24 volumes of the Labor Arbitration Reports show that breaches of labor agreements by employers as well as unions is no more uncommon than other breaches of contract. An employer can no more avoid the requirements of Section 8(d) and provoke or prolong a period of industrial strife because the union's breach occasions its termination of contract, than a union may immediately rescind its contract and strike upon an employer's breach.

Moreover, the Employer's termination of the contract cannot be justified as an act of self-defense. The stoppage had been ended for five days when the contract was terminated. No urgency existed which could support the Employer's prolongation of the dispute in plain violation of the provisions of 8(d) for the mitigation of disputes.

4. Petitioner submits that the Court below erred in excising the case here from this general principle solely because the Union had sought modification of the contract in mid-term without giving the notices required at 8(d)(3). Both the language and history of the 8(d) proviso support

the position of Chairman Herzog and Board Member Murdock [13] that 8(d) was intended to have force only in the period around the termination of an agreement and hence did not apply to the proposal here to modify a contract by mutual agreement at mid-term. Reinforcement of this position may be found in the history of the legislation originally submitted to the Senate Committee [14] and the rejection by the Conference Committee of the proposal making violation of a contract during its term an unfair labor practice,[15] as well as the addition by the Conference Committee of a provision explicitly exempting parties from any duty to discuss modifications of an agreement except as provided by the agreement itself.[16]

Senator Taft specifically rejected the accusation that 8(d) would apply to foreclose the possibility of adaptation of a contract to changed conditions during its term.

> "Parties may meet and discuss the meaning of terms of their contract and may agree to modifications on change of circumstances but it is not mandatory that they do so." [17]

Even if the UE had committed an unfair labor practice by seeking incorporation of new contract provisions in mid-term without filing the notices required by Sec. 8(d)(3), and by a one-hour work stoppage, its violation would not support the drastic action of terminating the contract which

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[13] *Lion Oil Co.*, 109 NLRB at p. 691; *United Packinghouse Workers of America*, 89 NLRB at p. 310.

[14] The proviso rejects the original proposal of S. 55, Sec. 3(2), (80th Cong. 1st Sess.) that a cooling off period should precede all economic action by either employers or employees and appears to adopt the scheme of S. 404, Sec. 3(a)(1) (80th Cong. 1st Sess.), applying restrictions only to changes in terms and conditions of employment to be incorporated in a "new" contract.

[15] House Conf. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. (1947), pp. 41-42, 1 Legislative History, LMRA, 545-546.

[16] House Conf. Rep. No. 510, p. 35, 1 Legislative History, 539.

[17] 93 Cong. Rec. 6860, 2 Legislative History, 1625.

the Court below upheld. Section 8(d) was intended to mitigate, not intensify labor disputes. A violation of its provisions does not grant an employer a hunting license for all time by which he may terminate a contract and refuse to negotiate in violation of the express provisions of 8(d) even though the union's unfair labor practice—if such there be—has ceased.

The decision below raises an important question for all parties to collective bargaining contracts. Changes in circumstances during a contract term are often sudden in their incidence and violent in their impact. If stabilization of collective bargaining relationships by written contracts is to be a feasible goal, then the parties to such contracts must know whether they may seek adjustments during the term of the contract without falling into unfair labor practices or must alter the duration and provisions of their contracts to forfend such a possibility.

The February 29th Discharge of the Non-Participants.

5. The decision below raises an equally important question by its departure from the previous general law governing the responsibility of individual union members for the acts of their union or of other union members. Previous decisions of this Court, grounded by fundamental constitutional considerations of due process (cf. *Schneiderman* v. *United States,* 320 U. S. 118), have established the principle that members of a union are not, by virtue of the sole fact of their union membership, liable for the acts of the union or other members unless their personal authorization, participation or ratification of those acts be proven. *United States* v. *White,* 332 U. S. 694, 702; *Lawlor* v. *Loewe,* 235 U. S. 522; *Eagle Glass & Mfg. Co.* v. *Rowe,* 245 U. S. 275; cf. *Coronado Coal* v. *U.M.W.A.,* 259 U. S. 344; *U.M.W.A.* v. *Coronado Coal Co.,* 268 U. S. 295. The decision below reverses this long established doctrine and treats membership in a Union as *prima facie* evidence of vicarious guilt.

The decision below and the Board's opinion treat the non-participants as an undifferentiated group. The decision, therefore, must rest upon the facts common to all of the non-participants. Those facts are:

1. All of the non-participants were union members.
2. None of them were shown to have dissented to the work stoppage prior to its occurrence.
3. All of them failed to identify themselves affirmatively as non-participants after the stoppage was over and after they had each been discharged by the Employer's statement of February 29th.

Resting on this evidence only, the decision below plainly reverses previous law as established by this Court. Individual authorization or participation is either not shown in the record or affirmatively disproved. Cf. *Lawlor* v. *Loewe*, 235 U. S. 522. Moreover, in this case, union membership need not even have been a voluntary act since it was compelled by contract. Nonetheless the decision holds that an employer may draw an inference of individual guilt for all acts of the Union from the mere fact of individual union membership, and may discharge an employee on the basis of this inference. An employee may only regain his employment by affirmative disproof of his participation, authorization and ratification. The Board and the Court below will, in their turn, accept the inference of guilt from Union membership and uphold the discharges made by reason of it. No longer must individual guilt be proven. It is assumed from the mere fact of Union membership and must be affirmatively disproved.[18]

In its reasoning, the decision below departs even further from the established rule and treats failure of an individual

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[18] The scope of the Board's new departure from customary agency rules is emphasized by the Board's decision in *BVD Co.*, 110 NLRB #106, 35 LRRM 1246, holding union members responsible for the unauthorized acts of unknown persons not even shown to be union members.

Union member to offer disproof of guilt after his discharge as affirmative evidence of guilt in and of itself.

The departure of the Court below from established doctrine is emphasized by the tenuous nature of the circumstances which it treated as affirmative evidence of guilt. The Employer's statement of February 29th, treating all employees as participants, made no request that non-participants identify themselves or report for work, and gave no direction as to how to do so. When the non-participants reported for work on February 29th with the other workers, they found all plant gates locked. In such a situation a person of ordinary understanding might well conclude—as did the Trial Examiner who heard the witnesses (J.A. 152)—that the Employer was not interested in ascertaining the identity of the non-participants, but was determined to punish participants and non-participants alike, and that no further response was called for or necessary.

6. The decision below seriously modifies the meaning and significance of the "fundamental right" to join a union which Congress (in Section 7) has made the keystone of the structure of the Act. By sanctioning and adopting an inference of guilt from the mere fact of union membership, it restricts the sweeping grant of Section 7 and requires that an employee join a union at his peril, a peril resulting from the mere exercise of his protected right to associate with his fellows. It invites total destruction of this right by placing the livelihood of the individual union member at the mercy of employer agents provocateur bent on destroying the union [19] or of hotheads and troublemakers often owing allegiance to competing labor organizations.

The reasoning of the decision below reaches far beyond the scope of rights under the National Labor Relations Act. It affects the status, rights, duties and responsibilities of some 15,000,000 union members and their legal relationship

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[19] Cf. *Remington-Rand, Inc.*, 2 NLRB 626; Sen. Rep. No. 6, Part 1, 76th Cong. 1st Sess. pp. 97-110, 136, 137.

vis a vis each other and their unions. It reaches all phases of the law where those relationships are legally significant, including injunction proceedings, criminal and civil contempt, damage claims in tort and contract, and rights to unemployment insurance. In addition it affects directly the great majority of collective bargaining contracts whose grievance and disciplinary clauses have been premised on the general rule as previously established and understood.

Moreover, the decision raises a grave constitutional question. The principle of personal guilt is "of the essence of the institutions of liberty."[20] The contrary principle of "guilt by association" created below by depriving the individual union members of the due process guaranteed them by the Fifth Amendment deprives them also of their freedom protected by the First and Fifth Amendments to associate in trade unions.

7. The decision below conflicts directly with decisions of other Courts of Appeals and of the highest court of Wisconsin where these events occurred. In *Marathon Electric Mfg. Corp.* v. *Industrial Commission and Leslie Dickinson,* 269 Wis. 394, 69 NW 2d 573, rehearing den. ___ Wis. ___, 70 NW 2d 576, upon the same facts presented here, the Wisconsin Court held that representative non-participants were not "guilty of any act of misconduct justifying their discharge." On petition for rehearing it pointed out, "We fail to see how conduct of an employee occurring after his discharge can constitute the basis for his discharge." ___ Wis. ___, 70 NW 2d at p. 576.

In *NLRB* v. *Marshall Car Wheel & Foundry Corp.* (CA 5), 218 F. 2d 409, the Court of Appeals rejected the employer's contention that it was justified in discharging all employees who had participated in a stoppage called by the union because certain of those employees had en-

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[20] Memorial of the Special Committee appointed by the Association of the Bar of the City of New York, New York Legislative Documents, vol. 5, 143d Sess. (1920) No. 30, p. 4.

dangered employer property in leaving work. The Fifth Circuit—while not explicitly referring to the Board's *Marathon* ruling by name—plainly applied different standards of responsibility to individual union members for the acts of their union. The Court, in remanding the case to the Board, ruled that only those who had participated in or "aided or abetted" the unprotected activity had forfeited their right to reinstatement (218 F. 2d at p. 417, fn 12), citing *NLRB* v. *Ohio Calcium Co.* (CA 6), 133 F. 2d 721, 726. It reinforced this direction by a quotation from its opinion in *NLRB* v. *Braswell Freight Lines,* 209 F. 2d 622:

> "[W]e ought not summarily 'by our decree entered to protect the employees, too often the forgotten men in struggles of this kind, deprive *them* of the rights the Act confers *not on unions* as such but on *employees* as such.'" (Court's emphasis.)

The decision below, raising a presumption of guilt from the acts of other workers, is in conflict, at least in principle, with *Stewart Die Casting Corp.* v. *NLRB* (CA 7), 114 F. 2d 849, cert. den. 312 U. S. 680. There the Employer contended that it need not reinstate a group of employees, some of whom were shown to have participated in a sit-down strike. The Seventh Circuit rejected the employer's attempt to place the burden of proving their innocence upon the employees, saying in part:

> "It would seem that petitioner's right in this respect, if any, would constitute matters of defense to the Board's charge and the burden was upon petitioner to offer proof in support thereof. Certainly, all of the employees should not be deprived of the benefits of the Act because certain undisclosed ones forfeited their rights" (114 F. 2d at p. 856).

Settlement of the conflicts in principle between the decision below and the general law as reflected in prior opinions of this Court, as well as the more direct conflicts with the decisions of other Courts of Appeals and the Supreme Court of Wisconsin is plainly in the public inter-

est. Neither industrial workers nor local union officials are sophisticated in the law, and the law which guides them in this vital phase of the employer-employee relationship should be clearly established.

Resolution of these conflicts is important, too, so that the parties to collective bargaining agreements may be guided in their conduct under these agreements and the drafting of new agreements. If Federal law is to differ from state law in the union-member-employer relationship (which is governed either singly or jointly in its various aspects by either or both), that fact should be known so that all concerned may guide their conduct accordingly.

8. The Employer's flat refusal in its letter of February 29th to bargain with the union leadership representatives chosen by workers constituted a plain violation of Sections 8(a)(1) and 8(a)(5) of the Act.[21] The decision below is therefore contrary to the opinion of other Courts of Appeals holding that an employer may not force its employees to choose between applying for work under illegal conditions of employment and the loss of their livelihood. *Stewart Die Casting Corp.* v. *NLRB* (CA 7), 114 F. 2d 849, 855, cert. den. 312 U. S. 680; *NLRB* v. *Mastro Plastics Corp.* (CA 2), 218 F. 2d 462, cert. granted 348 U. S. 910; *NLRB* v. *E. A. Laboratories, Inc.* (CA 2), 188 F. 2d 885, cert. den. 342 U. S. 671; *NLRB* v. *Kobritz* (CA 1), 193 F. 2d 8; *Berkshire Knitting Mills* v. *NLRB* (CA 3), 139 F. 2d 134, cert. den. 322 U. S. 747; *NLRB* v. *Stilley Plywood, Inc.*, 199 F. 2d 319, cert. den. 344 U. S. 933; *NLRB* v. *Brown & Root, Inc.* (CA 8), 203 F. 2d 139; *NLRB* v. *West Coast Casket Co., Inc.* (CA 9), 205 F. 2d 902. Resolution of this conflict, raising as it does the whole question of the rights and remedies available to employees whose employers commit unfair labor practices, is plainly important in the administration of the Act.

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[21] Cf. *Marathon Electric Mfg. Corp.*, 106 NLRB, at p. 1175 (J.A. 190-191).

The Employer Refusals to Bargain.

9. The ruling below, upholding the Board's forfeiture of employee's bargaining rights during a breach of contract by their union, transforms the Act from a remedial one servicing the interest of industrial peace to a punitive instrument of the jungle law of industrial warfare. The fact is that if industrial disputes are to be ended as rapidly as possible (the purpose of the Act), a channel of communication between an employer and the union must remain open, if only for the purpose of receiving an offer of unconditional surrender. Closing of this channel can only defeat the primary aim of the Act by intensifying and prolonging labor disputes. When the Employer here refused to meet with the Union to discuss the locking of the gates it prolonged the already terminated stoppage by what was at best a childlike display of spite, and at the worst, part of a scheme to destroy the Union. In either case the Employer's refusal to meet was contrary to the purpose of the Act.

Not in issue here are questions of the various rights of the parties—once the collective bargaining process has begun—during a breach of contract and the remedial action appropriate to the varied situations which may arise, e.g., whether an employer or a union confronted with a breach of contract must bargain upon the substantive merits of the dispute giving rise to the breach.[22] Nor is the right of a party to a contract to hold the other party to the terms of the contract raised here.[23] Those questions assume that collective bargaining is continuing and merely involve the regulation of its conduct. The decision below raises a question more fundamental to the scheme of the Act—whether there is to be collective bargaining at all, whether the obli-

[22] Cf. *Timken Roller Bearing Co.* v. *NLRB* (CA 6), 161 F. 2d 949.

[23] Cf. *NLRB* v. *Dorsey Trailers, Inc.* (CA 5), 179 F. 2d 589.

gation to bargain collectively is to be administered as a part of a system of rewards and punishments or is to be treated as a part of remedial statute for the purpose of avoiding industrial strife and unrest.

The Court below confuses here, as elsewhere, the "employees" to whom the Act grants rights with the unions which represent them. The question is not, as the Court below held it to be, whether the Union breached its contract. The question is whether employees, as long as they remain employees, shall have the right "to bargain collectively through representatives of their own choosing." The nature of this right and the employer's correlative duty must vary with the specific situation. Nothing in the Act authorizes its destruction as a punitive measure.

The importance of this question is emphasized by the fact that the present Board is continuing to treat the rights granted "employees" by the Act as rights subject to forfeit as a punishment. In a recent case, *Valley City Furniture Co.*, 110 NLRB No. 216, 35 LRRM 1265, it ruled that an employee who had engaged in a partial strike might—as a "legitimate disciplinary action"—be compelled to bargain individually with an employer even on a personal grievance without the presence of his bargaining representative.

The decision below enhances the vice of the Board's punitive deprivation of rights guaranteed to employees by the Act, by applying this punishment indiscriminately. Not only were the employees who participated in the strike deprived of their rights under Section 7. The innocent employees, including those on layoff status, were punished as well. The UE was their collective bargaining agent. They had committed no wrong. Yet, through no fault of theirs, they were deprived of their right to bargain through their representative and to secure a reopening of the gates so that they might return to work.

10. The decision below is the first conflict in principle on the Court of Appeals level with the decision in *NLRB*

v. *Highland Shoe, Inc.* (CA 1), 119 F. 2d 218.[24] That case differed slightly from the case here in that it involved a refusal to bargain after notice of the termination of a strike in breach of contract, but the decision did not rest upon that difference. The First Circuit found that the employer had violated the Act, holding (at p. 222):

> "Furthermore, unless the statutory duty to bargain collectively is held to remain in force even after a labor contract previously made has been broken, the purpose of the Act, to promote industrial peace through collective bargaining will be obtained only in small measure."

Plainly, in the light of the Board's continuing expansion of its doctrine of "forfeiture" of bargaining rights, resolution of the conflict here is of importance in the administration of the Act and the conduct of the employers and employees governed by it.

11. On the morning of February 29th, when the employees reported for work at the plant gates, the Employer was emphatically put on notice of the termination of the stoppage. No discharges having occurred the UE was plainly the representative of a substantial and representative complement of the employees and the Employer was obliged to bargain with it in response to the UE's request for bargaining made in the late afternoon of the previous day. The decision below does not so hold, adopting the contention by the Board that no violation of the Act occurred since the Union had not on the morning of February 29th renewed its request for a meeting to discuss the lockout which it had made only fifteen hours before.

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[24] *NLRB* v. *Dorsey Trailers, Inc.* (CA 5), 179 F. 2d 589, and *Timken Roller Bearing Co.* (CA 6), 161 F. 2d 949, deal not with the existence or forfeiture of the duty to bargain, but its content in various situations. In *Timken*, the Court explicitly did not decide the question of whether "by a breach of a no-strike agreement the Union surrendered bargaining rights preserved for it by the Act" (161 F. 2d at p. 954).

This position is in square conflict with other Courts of Appeals. In *NLRB* v. *Burton-Dixie Corp.* (CA 10), 210 F. 2d 199, the Court held that a request for bargaining which was ineffective at the time made for lack of majority support among the employees retained its vitality for twenty-three hours. A renewal of that request was unnecessary when a majority was obtained in the intervening period and the prerequisites for collective bargaining satisfied. In *NLRB* v. *M. H. Ritzwoller Co.* (CA 7), 114 F. 2d 436, the Court held (at p. 436) "it is not incumbent upon the employees continually to renew the proposal" and that a union request for bargaining retained its vitality for eight days.

The technical steps necessary to give rise to the duty to bargain on the part of an employer or union are clearly important in the scheme of the Act. Cf. *NLRB* v. *Columbian Enamelling and Stamping Co.*, 306 U. S. 292, 297. To the degree that they are encumbered by the requirement of mandarin niceties of etiquette the obligation to bargain is vitiated. The decision below, adopting the hypertechnical approach by the "new Board" ignores the realities of collective bargaining which is usually conducted on an informal basis by men untutored in the law. Certainly, the conflict in the circuits based upon opposing approaches to collective bargaining should be resolved so that all concerned may attempt to guide themselves accordingly.

12. In point of fact the Employer knew of the termination of the stoppage on February 28th and February 29th and breached its obligation to bargain on both days. The Trial Examiner after hearing the witnesses accepted the following as a correct version of the telephone conversation between the UE and the Employer's Plant Manager on February 28th.

> "[We] told him that we had a membership meeting that afternoon and the company had locked the workers out. We told him that we wanted him to understand

that the members of the bargaining committee knew that he was not responsible for the Company's actions, and he assured us that he was very much concerned over the company's actions, that he had a lot of respect for the union, for the bargaining committee, for the manner in which he handled our dealings and negotiations with him, and that he was very much concerned over the locking of the gates, and he would contact Mr. Wall and see if he couldn't do something to get us together in negotiations again. We thanked him for his concern and told him that we could be reached at any reasonable hour at the union office by phone" (R. 16).

The Board was plainly incorrect in its description of this conversation as merely requesting "a conference to settle the strike issues" (J.A. 198). The credited testimony gives not one scintilla of support to this finding, upheld below. It completely supports the findings of the Trial Examiner (buttressed with all the authority which *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, gives it) that—the stoppage having ended—the Union sought to confer "concerning the termination of the strike and the return of the employees" (J.A. 150-151, 154; cf. J.A. 158).

The Union in its call to the Employer made no demand whatsoever for negotiation of the issues giving rise to the strike, either as a preliminary to the return to work or otherwise. The only issue it raised was the gates being locked, the traditional sign of no work. Since the gates were already locked, the Union could only have raised this question because it wished them open, i.e., because the stoppage was over. The whole tenor of the Plant Manager's response ("He was very much concerned over the Company's actions. He was very much concerned over the locking of the gates") shows that this also was his understanding of the Union's position. The Employer was unmistakably put on notice on February 28th of the termination of the stoppage. By refusing to return the Union's telephone call and to agree to a meeting, it violated the Act.

The Discriminatory Nature of the Discharges of the Participants in the Stoppage and the Failure to Recall the Laid-off Workers.

13. The issues discussed above are part of a whole and connected one to another by the common link of the Employer's basic motivation for all its actions herein—the total destruction of the Union. It was this motivation which the record shows underlay the discharge of all workers, including the participants in the stoppage and the refusal to recall the laid off workers by their seniority under the contract. The discharges of the participants and the failure to recall the laid off workers, "based upon the exercise of legal rights which the statute was designed to conserve" were discriminatory and violated the Act.[25]

The evidence in the record with regard to the Employer's discriminatory intent stands as follows:

a. The Employer admits that on February 28th it resolved absolutely and without condition "never to deal or bargain with the union again" (J.A. 108).

b. It discharged all employees on the active roll of February 29th making no distinction between them, although its own records showed it that many of these employees did not and could not have participated in the stoppage.

c. It explicitly tied these discharges to union membership by basing them upon the "action taken by the Union and its members" and refused to deal with "the present union leadership" (J.A. 167-168).

d. It refused to meet with the Union on February 28th or 29th even though it knew of the termination of the stoppage and even though it knew that the union represented a substantial number of employees who had not participated in the stoppage.

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[25] *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 256-257. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45.

e. Rather than recalling the laid off employees experienced in its operations, it advertised on March 3rd for new employees, although experienced hands are plainly more efficient than new workers. Moreover, the Employer made it clear that response to its advertisement would mean abandonment of the Union by stating "There is a strike in progress," a statement it knew to be untrue (J.A. 168).

f. In terminating the contract on March 5th it again advised the employees in asking them to apply for work that a restoration of their seniority depended, if they did apply, on their adherence to and selection of "a union which will act in a responsible way" (clearly not the UE to the Employer's mind) (J.A. 169).

g. On March 18th it discharged four watchmen in violation of the Act by conditioning their employment upon resignation from UE (J.A. 190).

h. On March 22nd it stated that it would only deal with a union which has "an established reputation of living up to their agreements" (in this context a clear exclusion of UE) (J.A. 172).

i. It assisted, sponsored, contributed support to and interfered with the formation of a rival union in violation of section 8(a)(2) of the Act shortly after the plant was reopened (J.A. 190).

j. Representatives of the Employer repeatedly stated they would never deal with UE again (J.A. 190-191).

This catalogue at the least presents a *prima facie* case which required the Employer "to distintangle the consequences with which it is chargeable from those from which it is immune."[26] Yet the Employer did not even attempt

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[26] L. Hand, J., *NLRB* v. *Remington Rand* (CA 2), 94 F. 2d 862, 872.

to meet this burden. None of its witnesses even bothered to deny its discriminatory intent and its President boldly affirmed his anti-union motivation (J.A. 108). In short, the General Counsel's *prima facie* case of violation of Section 8(a)(3) stands unrebutted. All the evidence supports the General Counsel's position that the discharges of the participants in the stoppage and the refusal to recall the laid off workers was discriminatory and violated the Act.

14. The question of whether or not the actions of the participants in the stoppage violated the requirements of 8(d) has been discussed in paragraphs 2 to 4 above. Assuming arguendo that such violation existed an important question is raised by the decision below that the Employer was privileged thereby to discharge the participants in the stoppage—not because of their participation in the stoppage but solely because of their membership in the Union.

A strike in violation of 8(d) deprives participants of their status to employees of the employer engaged in the particular labor dispute "for the purposes of sections 8, 9 and 10" of the Act. A reading of the Act compels the conclusion that this provision is not meant to and does not permit an employer to discriminate against an employee because of his union membership. The limitations of 8(a)(3) do not depend upon the possession of "employee status." Discrimination of all kinds is prohibited. *Phelps Dodge Corporation* v. *NLRB*, 313 U. S. 177.

This limitation is in accord with the scheme of the Act from its inception. An employer has at all times had the right to discharge an employee for cause, including the employee's breach of contract. Cf. *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332. At no time might an employer use this right "to discourage membership in any labor organization" (Sec. 8(a)(3)). The 8(d) proviso leaves this scheme of the original Act unchanged. The decision below reversing this scheme and licensing discriminatory action by an employer will serve as precedent for other employers

to seek for and find technical violations of Section 8(d) and, by forcing a strike, issue to themselves a similar license to discriminate in violation of the Act. It raises, therefore, a serious and important question which this Court should decide.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutory Provisions Involved

The relevant provisions of the National Labor Relations Act as amended, 61 Stat. 136, 29 USC 151 *et seq.*, are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

APPENDIX B

(Opinion)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12114

UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE), LOCAL 1113, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition for Review of Order of the National Labor Relations Board

Decided May 26, 1955

Before PRETTYMAN, DANAHER and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* United Electrical, Radio and Machine Workers of America, Local 1113, which we shall call UE, filed with the National Labor Relations Board charges against the Marathon Electric Manufacturing Corporation, which we shall call the Company, alleging violations of several subparagraphs of Section 8 of the National Labor Relations Act as amended.[1] The Board found in favor of the Union in some respects, not now involved, and found that a preponderance of the evidence did not sustain the charges in other respects. These latter portions of the findings and order are the subject matter of the present petition.

UE had been the recognized bargaining representative of the Company's employees for more than fifteen years

[1] 61 Stat. 136 (1947), 29 U.S.C.A. § 151 *et seq.*

prior to 1952. The last contract entered into by it with the Company was effective July 31, 1951, for a one-year term. The contract contained, *inter alia*, a union-shop clause, a grievance and arbitration clause, and a no-strike, no-lockout clause. The latter provided in part that "In view of the orderly procedure outlined in this agreement, the Union will not authorize or sanction any strike, stoppage, slow-down, or restriction of out-put * * *. In case [of] any such action * * * any or all of the employees taking part will be subject to discipline or discharge."

A dispute over a general wage increase occurred. In the midst of it, on February 28, 1952, UE officers and stewards called a meeting of the full membership of the Union for two o'clock that afternoon. They notified all employees at work and made several announcements over the local radio station. Sharply at two o'clock all of the 446 employees in the plant, except one watchman, stopped work, walked out, and with few exceptions went to the meeting. No prior strike notice had been given the Federal Mediation and Conciliation Service, and the only basis in the record for a claim of notice to the Company is in a telephone conversation between a Union officer and a Company officer one hour before the walkout. The plant employees were given no indication by the Union officers and stewards as to how long the walkout would last or when they would return to work. Neither was the Company given any such information. About thirty minutes after the walkout the manager of the plant directed that the various gates be closed and locked. Some twenty out of forty-nine second-shift employees, due to start work at three o'clock, appeared in the vicinity of the plant. They were advised by their stewards of the Union meeting then in progress. Practically all of those who had come to the plant went on to the meeting. The meeting was occupied with discussion of various features of a strike. At about three o'clock a steward arrived, asked for a point of order, was immediately recognized, and announced,

"The gates are now officially locked." After this announcement and some further discussion the chairman directed the employees to report for work at their regular times and to continue to report until told otherwise.

The next day, February 29th, the Company sent to every employee on its current payroll a letter, which stated in part:

> "Since the action taken by the Union and its members Thursday afternoon was the second such violation resulting from irresponsible leadership, the Company has no alternative but to consider that all participants have forfeited any rights as employees and are accordingly being removed from the Company payroll." [2]

The following Monday, March 3rd, the Company advertised by newspaper and radio for employees, and on March 5th sent another letter to all employees (except Union officials) who had been on its payroll, urging them to reenter Company employ. That same day the Company sent UE a letter saying in part:

> "We hereby notify you that because of the breach of our contract with you dated July 31, 1951, we hereby cancel the contract.
>
> "All employees who have taken part in the strike are discharged under Article XII section 3 of the contract.
>
> "Therefore, you no longer represent a majority of our employees and we cannot continue to recognize you as a Bargaining agent for our employees."

Beginning March 27th a series of demands for bargaining were made upon the Company by UE. The Company did not respond to these requests.

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[2] The expression "second such violation" was a reference to a strike called by UE in July, 1946, which lasted five or six weeks.

I

UE says the Company violated the Act by terminating the contract. The Board found the walkout was a breach of the contract [3] and concluded that the subsequent cancellation by the Company was justified and not a violation of the statute. Of course, if the breach *ipso facto* terminated the contract, UE has no support for its contention respecting termination by the Company. But in order to consider the contention we will assume *arguendo* that the breach by UE was not in itself a complete termination of the contract; that is, we will assume that after the breach the Company elected to rescind and thereupon formally terminated the agreement.

It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so.[4] And that rule applies to labor contracts.[5] Moreover, in cases where the breach is a strike in violation of a collective bargaining agreement, as in the instant case, application of the rule is supported by the rationale underlying such agreements. The prevention of strikes is one of the principal purposes of labor contracts and of the Act.[6] A no-strike provision is "The chief advantage

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[3] In its Decision and Order the Board stated, "The Trial Examiner found, and the General Counsel concedes, that the * * * walkout was unprotected [by the Act] because it was in breach of the contract." In the present appeal UE makes no argument to the contrary. We agree with that finding.

[4] 5 Williston, Contracts §§ 1455, 1467 (Rev. ed. 1947); Restatement, Contracts § 397 (1932).

[5] Boeing Airplane Co. v. Aeronautical Industrial District Lodge No. 751, International Ass'n of Machinists, 188 F. 2d 356 (9th Cir. 1951), *cert. denied*, 342 U.S. 821, 96 L.Ed. 621, 72 S.Ct. 39 (1951); United Biscuit Co. v. National Labor Relations Board, 128 F. 2d 771, 775 (7th Cir. 1942); Boeing Airplane Co. v. National Labor Relations Bd., 85 U.S. App. D.C. 116, 174 F. 2d 988 (D.C. Cir. 1949).

[6] S. Rep. No. 105, 80th Cong., 1st Sess. 15-16 (1947); Sec. 1, National Labor Relations Act, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C.A. § 151.

which an employer can reasonably expect from a collective labor agreement".[7] The walkout was a material breach which justified the subsequent rescission of the contract by the Company.

UE makes an argument that the Company's termination of the contract was illegal because contrary to the provisions of Sections 8(a)(5) and 8(d) of the Act. Section 8(a)(5) says that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. Section 8(d) is the section which defines collective bargaining, and it further provides, *inter alia*, that a collective bargaining agreement shall not be terminated unless the party desiring such termination (1) gives the other party to the contract sixty days prior notice, (2) gives the Federal Mediation Service thirty days prior notice, (3) offers to confer with the other party for the purpose of negotiating a new contract, and (4) continues the contract in full force and effect without resorting to strike or lockout for sixty days after the notice to the other party. The major premise of UE's argument is that "The Employer's action purporting to terminate the agreement was a refusal to bargain under the Act." But UE itself had violated Section 8(d) and so had refused to bargain collectively. The Section provides that "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification" meets the conditions of the Section.

A binding contract was in existence. UE, not the Company, was desiring modification of the existing contract. The contract provided for a wage increase of five cents an hour. There was a further provision for an additional increase of four cents an hour "if permitted by government policy". An increase of seven cents an hour

[7] S. Rep. No. 105, 80th Cong., 1st Sess. 16 (1947).

was put into effect by the Company. A joint petition was filed with the Wage Stabilization Board seeking approval of the remaining two-cent increase. That petition was withdrawn by UE prior to decision by the Board. Thereafter UE took the position that the remaining two cents should be put into effect in the form of fringe benefits. In taking that position UE sought to modify the existing contract. In attempting thus to modify the contract by its demands upon the Company, UE was required to comply with the Section. It complied with none of the provisions of the Section. By not complying it was refusing to bargain collectively within the definition of the Section. This refusal occurred before the alleged refusal of the Company. As we shall see in a moment, under further provisions of Section 8(d) the employees who engaged in the strike without complying with the sixty-day notice requirement lost their status as employees. Under the foregoing conditions it seems clear that the employer was not required to comply with the provisions of Section 8(d). To hold otherwise would mean that one party could flatly refuse to comply with these provisions but at the same time demand for himself all the benefits of the Section.

II

The next point concerns the discharge of employees consequent to the strike. The point divides itself into two questions: (1) Did the Company violate the Act when it discharged the strike participants?[8] (2) Did the Company discharge non-participants and thereby violate the Act?

1. UE urges that the employees who participated in the strike were discharged because of their Union mem-

[8] There was no issue before the Board respecting the discharges of the first-shift employees, who actually walked off the job to attend the meeting of the Union. We are therefore concerned only with those employees who can properly be classed as participants in the strike even though not among those who in fact walked off the job.

bership and therefore the Company violated Sections 8(a)(1) and 8(a)(3) of the statute. It concedes that, had the Company discharged these employees because of their participation in the breach of the contract, the discharges would not have been in violation of the statute.[9] But it contends the discharges were part and parcel of the Company's prior decision to abandon the contract and were not predicated upon the strike. The evidence does not support the contention. Moreover Section 8(d) of the Act specifically provides that "Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee". This strike was within the sixty-day period, and so the participants immediately thereupon lost their status as employees. Section 8(a)(1) refers to "employees", that is, to persons with "status" as employees. Having lost such status, the participants were no longer protected by that Section.

Section 8(a)(3) makes it an unfair labor practice for an employer to discourage membership in a union by discriminating in respect to hire or tenure of employment. It makes no express requirement that the discrimination be directed to employees, and the Supreme Court has held[10] the prohibition to apply to applicants for employment. But this case does not concern hire or tenure; it concerns discharges. The position of UE on the point is not clear, but it seems to rest upon the same premise as does its argument in respect to Section 8(a)(1), *supra*, and here again the evidence fails to support the contention. The Board's conclusion in respect to it seems to us well grounded in the record.

2. The Company's notices of discharge were addressed to "participants" in the strike. Disputes arose before the

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[9] See Labor Board v. Sands Mfg. Co., 306 U. S. 332, 344, 83 L.Ed. 682, 59 S.Ct. 508 (1939).

[10] Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 85 L.Ed. 1271, 61 S.Ct. 845 (1941).

Board as to whether certain employees, not present at the plant at the time the strike was initiated, were or were not participants. These employees were all members of the Union. The strike was called by the Union at a meeting which every member was entitled to attend, and the strike action received the complete support of every member present. Each of these employees received the Company's letter of February 29th, informing him that "participants" in the strike would be considered to have forfeited any rights as employees. No employee took any steps to indicate that he was not a participant. He had a right to claim and to establish that he was a non-participant. By choosing to remain silent and taking no steps to disavow the action of their agent, despite the invitation from the Company to take such steps, these employees were found by the Board to have acquiesced in, ratified, and become parties to their agent's action. The question was one of fact, and there was evidence on the record as a whole to support the Board's conclusion. We find no merit in UE's argument that the Board's decision on this phase of the case rested upon an inference of guilt from union membership. The record supports a finding of ratification of the illegal strike activity as a factual matter.

III

The next point concerns employees who were at the time of the strike in a lay-off status. The contract between the Company and UE accorded laid-off employees a priority in filling vacancies. The Company did not accord these people this priority but rather notified them that they might secure employment by applying as new employees. UE says the Company took this course in order to discourage union membership and thus violated Section 8(a)(3) of the statute. The Company says its course was motivated entirely by the fact that the contract had been terminated. The Board found no evidence in the record to rebut the contention of the Company and therefore concluded the failure to recall these employees was not shown to have been discriminatorily motivated.

UE says the Company had a policy, apart from the contract, of seeking out and reemploying former employees. And it says the uneconomic departure from this normal practice demonstrates the sole motive to have been discouragement of union membership. It buttresses this argument by stressing the fact that the advertisement for new workers was issued two days before the formal rescission of the contract. The Board found no evidence to show a practice and policy on the part of the Company. And it found the evidence failed to make out a motivation of discrimination. We find no sufficient basis to disturb these conclusions, matters peculiarly within the area confided to the Board and its function as fact-finder. While there was a bit of evidence indicating a practice apart from the contract, it was a very minute bit; the matter was clearly controlled by the contract, and the contract had been breached by the Union, the representative of all the employees, and was in process of being formally terminated. It seems to us the Board was correct in its view that the contractual rights of these employees could not survive the breach of the contract by the Union, and its evaluation of the evidence was accurate.

IV

The next point concerns the refusal of the Company to bargain with UE after the strike had been called. As to such a refusal on February 28th, the Board reasoned that, even if UE was still the bargaining representative of the employees, the Company was under no obligation to bargain in the absence of notification that the illegal strike had been terminated. This has been the policy of the Board.[11] In the *Times Publishing Company* case[12] the

[11] Higgins, Inc., 90 N.L.R.B. 184 (1950); United Elastic Corporation, 84 N.L.R.B. 768 (1949); Dorsey Trailers, Inc., 80 N.L.R.B. 478 (1948), *aff'd in relevant part*, 179 F. 2d 589 (5th Cir. 1950); Charles E. Reed & Co., 76 N.L.R.B. 548 (1948).

[12] 72 N.L.R.B. 676 (1947).

Board held that a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude a finding of a violation by an employer of his duty to bargain. The Report of the House Committee specifically cited that case as obviously correct.[13] As we have indicated, when UE, seeking modification of an existing contract by proposing wage adjustments into the agreed scale, called a strike in flat violation of the contract and of the explicit terms of Section 8(d) of the Act, it was guilty of failure to bargain in good faith as that term is defined in Section 8(d). The statute has in it many provisions valuable to labor organizations, and protects them in the exercise of their rights, but it does not give them authority to violate the Act wantonly and at the same time to insist upon full measure of the privileges afforded them when proceeding properly. The Board found that on February 28th the Company had no notice of the termination of the strike. That finding is supported by the record and properly leads to the conclusion that the Company did not violate the Act in refusing to bargain with UE on that date.

After February 28th UE made no further efforts to bargain until March 27th. An overture on that date was rejected by the Company, as were all others subsequent thereto. The Board concluded that on those occasions there were no violations of the statute, if UE no longer represented a substantial and representative segment of the Company's normal working force. That rule is well established [14] and is not attacked here. UE urges that it did not represent a substantial number of the employees at the times involved. But, as we have pointed out, except for four individuals not here involved the persons whom

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[13] H.R. Rep. No. 245, 80th Cong., 1st Sess. 27 (1947).

[14] J. I. Case Co. v. Labor Board, 321 U.S. 332, 337, 88 L. Ed. 762, 64 S.Ct. 576 (1944); Labor Board v. Sands Mfg. Co., *supra* note 9; Labor Board v. Fansteel Corp., 306 U.S. 240, 262, 83 L.Ed. 627, 59 S.Ct. 490 (1939).

UE represented at these later dates were no longer employees of the Company. We agree with the conclusion of the Board that the Company was under no obligation to bargain with UE on these occasions.

V

The final question is whether the Company violated the Act by locking the gates to the plant. The Board found that the decision to close the plant was motivated by economic considerations. UE urges that the action was motivated by discriminatory reasons. The record indicates that at the time of the lockout the Company did not know how long the strike would last. In addition, the evidence tended to show that it would not have been economically sound to operate the plant with the second and third shifts alone. The Board's finding is supported by the record as a whole.

Affirmed.

Decree

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,114 April Term, 1955

UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE), LOCAL 1113, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

On Petition for Review of Order of the National Labor Relations Board.

Before: PRETTYMAN, DANAHER and BASTIAN, Circuit Judges.

DECREE

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and decreed by this Court that the order of the National Labor Relations Board on review in this cause be, and the same is hereby, affirmed.

Dated: May 26, 1955.

Per Circuit Judge PRETTYMAN.

United States Court of Appeals
for the
District of Columbia Circuit
Filed May 26, 1955
JOSEPH W. STEWART, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 343

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1113, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 36-47) is reported at 223 F. 2d 338. The findings of fact, conclusions of law, and order of the Board (J. A. 183-208)[1] are reported at 106 NLRB 1171.

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[1] "J.A." references are to the joint appendix in the court below; "Tr." references are to the original typewritten transcript of testimony.

JURISDICTION

The decree of the court below was entered on May 26, 1955 (Pet. 36). The petition for a writ of certiorari was filed on August 23, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether an employer may, upon the union's material breach of a collective bargaining agreement, elect to rescind the agreement without first complying with the requirements of Section 8(d) of the National Labor Relations Act, as amended.

2. Whether substantial evidence supports the Board's finding, affirmed by the court below, that certain employees, who were not present at the plant when a strike in breach of a collective bargaining agreement was called by the union, thereafter acquiesced in, ratified, and became parties to the action, rendering them subject to discharge.

3. Whether the Board and the court below properly found that the employer, whose employees went on strike in breach of contract, was not required to bargain with the union responsible for the breach until it received notification that the illegal strike had been terminated.

4. Whether substantial evidence supports the finding that the employer discharged employees, who engaged in an unprotected strike, and failed to recall others, who had been laid off, for nondiscriminatory reasons.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in the appendix to the petition for certiorari, pp. 33-35.

STATEMENT

I. The Board's Findings of Fact

A. *The 1952 strike in breach of the collective bargaining agreement*

Since 1937 petitioner ("UE") has been the recognized bargaining representative of employees of Marathon Electric Mfg. Corp. ("the company"), and UE and the company have been parties to successive collective bargaining contracts (J.A. 126-127, 184).

The last of these contracts, effective on July 31, 1951, for a one-year term, contained, *inter alia,* a union-shop clause, a grievance and arbitration clause, and a no-strike, no-lockout clause (J. A. 126, 184; 116-119, 122). The no-strike, no-lockout provision stated in pertinent part: "In view of the orderly procedure outlined in this agreement, the Union will not authorize or sanction any strike, stoppage, slow-down, or restriction of out-put. . . . In case [of] any such action . . . any or all of the employees taking part will be subject to discipline or discharge" (J. A. 126, 184; 122).

The contract further provided for an immediate general wage increase of 5 cents and, further, that "up to four (4) cents" "may be added to all job rates if permitted by government policy" (J. A. 129, 185; 121). The company thereafter put into

effect a wage increase totalling 7 cents (J. A. 129, 185; 99-100). The parties were unable to agree, however, whether express Wage Stabilization Board ("WSB") approval was required under existing regulations to grant the remaining 2-cent increase permitted by the contract (J. A. 129, 185; 14, 99-101). A joint Company-UE petition in this regard was filed with WSB in the fall of 1951, but, before being acted upon, was withdrawn by UE (J. A. 129, 185; 96-97, 100, 102). UE thereafter took the position that the remaining 2 cents in issue should be put into effect in the form of fringe benefits without obtaining WSB approval (J. A. 129, 185; 98-99, 101). The company rejected this proposal on February 27, 1952, since the contract did not provide for an increase in the form of fringe benefits; it offered, instead, to grant the remaining 2 cents as an increase in the base pay rate subject to WSB approval, as had been specified in the contract (J. A. 129-130, 185; 95-99, 101-102, 121).

The prior week, on about February 22, general membership meetings were held by UE at times permitting employees from all three plant shifts to attend during nonworking hours (J. A. 129; Tr. 87, 1480). By secret ballot the employees authorized the taking of a strike vote in the event one should be necessitated by future dealing with the company, and were informed by a UE official that the vote "was being taken to hold a club over the Company's head" (J. A. 129; Tr. 82-88, 1021-1022, 1480). At least some employees attending gained the impression that the vote had authorized the calling of a

strike, and information to this effect reached the company (Tr. 1021, 1147-1151, 1156, 1193-1194, 1353, 1369, 1398, 1404, 1408-1409).

The day after the company announced it would not modify the contract. February 28, UE officers and stewards on all three shifts met and voted to call a full membership meeting for 2 p. m. unless the company settled the pending issues or arranged to confer before that time (J. A. 130, 185; 31-33, 120, 544, 651, 861, 1281, 1471). Notification was to be given first shift employees at work by their stewards, and second and third shift employees, not due at the plant before 3 p. m., by radio announcements; in the event of company capitulation, members stationed at the hall were to head off any employees arriving in response to the radio announcements (Tr. 32, 35, 676).

At noon UE President Muelver notified Manager Keuchle that the company would have "until 1 o'clock to put the two cents into effect in some form or other," and, if it did not, Muelver would not "be responsible for the consequences" (J. A. 130, 185; 1358-1359). When Muelver called again shortly before 1 p. m., Keuchle replied that there had been "no change" in the company's position (*ibid.*).

Several spot radio announcements of the meeting, directed "to all members," were made by UE between noon and 1:30 p. m. (J. A. 130, 185; Tr. 34). The first shift employees then at work (who, like all the plant employees, were UE members) were notified of the impending walkout by their stewards, who gave no indication of how long the

walkout would last or when they were to return to work (J.A. 130, 185; 64-69, 73-81, 83-84, 86-89, Tr. 34). The employees, many of whom expressed doubts concerning the wisdom and legality of the action, were variously advised by Muelver, their stewards, and other UE officers that "this was going to be a long drag," that postponing the meeting to nonworking hours "wouldn't hold a club over the Company," and that, in the event the plant were shut down following the walkout, they would not "have to strike" (J. A. 131, 151-152, n. 20; 730, 1029, 1038, 1060-1061, 1135, 1141-1142, 1160, 1167, 1170-1171, 1174-1175, 1210, 1230).

At 2 p. m. all of the 446 employees in the plant, except a watchman, stopped work, walked out, and, with few exceptions, went to the UE meeting (J. A. 126, 130, 133-134, 185).[2] On leaving the plant employees indicated to their supervisors that the strike might be protracted and of indefinite duration (R. 131; 71, 84-85, 93, 94).

B. *The discharge of the strikers and the Company's refusal to bargain with UE*

About 30 or 40 minutes after the walkout the plant was shut down (J. A. 131-132, 186; Tr. 1251-1252, 1363). The continued operation of the plant with the second and third shifts alone, in the event those employees chose to report, would have been economically unfeasible since the company had been

[2] Of the 480 first shift employees, 34 were not present at the time the walkout occurred due to either having finished their work shift early or excused absences (J.A. 126, 133-134, 185).

given no indication, and had no means of ascertaining, when the first shift work stoppage would terminate (J. A. 130-131, 150, 185-186, 191-192; 99, 104-110).

While the gates were being closed the second shift watchman arrived and was admitted to the plant by a foreman (J. A. 127, 131-132, 136, 187; Tr. 647, 658-660, 923-924, 1254). Of the 49 second shift employees due to start work at 3 p. m., 20 who had not previously heard of the walkout arrived at the plant shortly before 3 p. m., were advised of the UE meeting by union stewards stationed in the vicinity, made no effort to speak to or request admittance from company representatives near the closed gates, and thereafter, with few exceptions, went on to attend the UE meeting (J. A. 132, 134-137, 186).[3]

At the UE meeting, which began at 2:30 p. m. and was attended by employees from all three shifts, discussion assuming that a strike was in progress continued until 3 p. m., when a steward arrived and announced the plant had been shut down (J.A. 131-132, 134-135, 137, 150, 186; 56, 65, 71-75, 78-81, 85-86, 88-89, 91-93, Tr. 37-38, 80, 111, 124, 649-650, 670-673, 700, 1025-1026, 1045-1046, 1181-1182, 1236, 1286). Prior to that time no UE official had indicated how long the stoppage would last and none of the second shift employees, due at work at 3 p. m., had left the meeting (J. A. 132,

[3] See also Tr. 166-170, 445, 448, 475-476, 481-482, 506-507, 526-527, 540-541, 544, 548-549, 557, 562-563, 623-624, 627, 646-653, 656-660, 664-669, 673-674, 686-690, 737-738, 746-747, 796-798, 800-808, 857-863, 882-883, 997-998, 1385).

134-135; Tr. 36-38, 492, 735-736, 1025-1026, 1041, 1052-1058, 1066, 1072, 1084, 1091-1092, 1131, 1136, 1479). Upon announcement of the shutdown, Muelver stated that the employees were locked out, and not on strike, and directed them to report at their regular shift (J. A. 132, 186; 37, 79-80, 112, 126, 700, 1472), a direction followed until revoked by UE on March 3, when a picket line was established (J. A. 127, 186; 42-43, 80-82, 112, 188, 396, 403-404, 583, 706, 715-717, 722, 837, 974, 989-992, 1043, 1386).

As employees were leaving the February 28 meeting, Bargaining Committeeman Weiland predicted UE would have the company's president "on his knees in a week or two" (J.A. 79). Following the meeting, and on the same day, UE twice requested that the company bargain, as UE President Muelver testified, in order "to resolve our differences to date" (J. A. 133, 186, 198; 15-16, 57-58, 112-113). The company was not advised on either occasion that the strike had terminated, received no notice to that effect, and did not reply (*ibid.*, J. A. 103).

The next day, February 29, the company sent a letter to every employee on its current payroll. After setting out the contract provision prohibiting all strikes and rendering "employees taking part" subject to discharge, it concluded (J. A. 137-138, 186, 193-194; 167-168):

> Since the action taken by the Union and its members Thursday afternoon was the second such violation resulting from irresponsible leadership, the Company has no alternative but to consider that all participants have for-

feited any rights as employees and are accordingly being removed from the Company payroll.

On March 3 the company, stating a strike was in progress at the plant, advertised for employees (J.A. 127, 186; 168). On March 5, the day after picketing of the plant by employees from all three shifts began (*supra*, p. 8), the company again sent a letter to all employees who had been on its payroll—except UE officers and stewards—urging them to reenter the company employ and notifying them the contract was being cancelled because of UE's breach in "causing this strike" (J. A. 138-139, 187; 168-169).

The company also wrote to UE on March 5 that it was cancelling the contract because of UE's breach, that "all employees who have taken part in the strike are discharged," and that UE would not thereafter be recognized as bargaining agent since it "no longer represent[s] a majority of our employees" (J. A. 187; 169-170). Thereafter, beginning on March 27, UE made a series of demands for bargaining. The company did not respond (J. A. 159, 199; Tr. 59-60, 116-120).

On August 27, the company again wrote to those employed on the second and third shifts, or who were absent from the first shift on February 28 when the walkout occurred, stating, in part (J.A. 173-174, Tr. 985-986):

> The claim recently has been made that Second and Third Shift employees did not participate in this strike. If you did not partici-

pate in the strike when it began or were not on strike when you received the letters of February 29th or March 5th, you should have so notified us promptly after receiving these letters and you should have reported for work in accordance with our letter of March 5th. You did not do so. You have never contacted us in any way since you received your letters. Your failure to report for work or to answer our letters indicated to us that you concurred in the action of Local 1113 and were a participant in the strike.

You know that our plant has been operating ever since March 18, 1952, and that ever since we have been advertising for help. You have never reported for work.

We want additional help in the plant and will sure put you on the job if you report for work.

None of the employees falling within these categories ever attempted to disassociate themselves from the strike action or to advise the company they had not shared in that action (J.A. 192-193, 194).[4] Almost all of them who testified at the hearing before the trial examiner and were questioned concerning the matter indicated that they would not have accepted any offer of reinstatement which did not include all the UE members who had engaged in the walkout, or which required them to

[4] Tr. 142, 149, 171, 200, 361, 392, 400, 443, 460, 470, 515, 525, 538, 595, 627, 801, 820-823, 845, 849, 947, 977, 992, 1297, 1385-1386, 1450-1452).

cross the UE picket line to work either with "scabs" or under terms other than those in the terminated UE contract (J.A. 194; 25-27, 31-33, 36-41, 44-45, 47, 49-56). The plant was still being picketed by UE when the hearing in the instant case began in October 1952 (J.A. 186; 49).

Prior to the strike (between November 1951 and February 28, 1952) the company had laid off a number of employees for economic reasons. The contract with the union required that laid-off employees be given priority in filling vacancies. When the company began to recruit employees, following the strike, it did not seek out and individually offer reemployment to those who had been previously laid off, the company claiming that the contract having been lawfully rescinded, it was no longer under an obligation to give laid-off employees the priority required by the agreement. So far as the record shows, no one who did apply was denied reemployment (J.A. 195-196; 169-173).

II. The Board's Conclusions and Order

Upon the facts summarized above, the Board found, in relevant part (J.A. 199), that UE's strike was in breach of the no-strike clause of the collective bargaining contract between UE and the company, and that the latter's cancellation of the contract was justified by the union's prior breach and did not constitute a violation of the Act. The Board further found (J.A. 191) that since the strike was an unprotected activity, the company had lawfully discharged all those employees who participated in the strike. In this connection the

Board also found (J.A. 193-195) that the company had lawfully discharged a group of employees who, although they were not present in the plant when the strike was called, had subsequently approved and ratified the unprotected strike action. The Board also found (J.A. 191-192) that the company's shut down of the plant on February 28, following the inception of the strike, did not constitute an illegal lockout since it was prompted solely by nondiscriminatory economic considerations. The Board rejected the claim (J.A. 195-196) that the company had discriminatorily refused and failed to recall the group of employees who had been laid off between November 1951 and February 28, 1952. The Board concluded that although these employees had had a right to recall and reemployment, that right was dependent upon the contract between the company and UE; that, inasmuch as the UE had breached the contract, and the company had lawfully rescinded it, the latter was no longer under any obligation to recall them; and that the company in declining to recall them had acted solely on the basis of the cancellation of the contract rather than, as alleged, on the basis of discriminatory reasons. Finally, the Board found (J.A. 198-201) that the company was under no obligation to bargain collectively with the union either on February 28, 1952, since the union had not given notice that it was terminating the unprotected strike, or on March 27 and thereafter when the union, as a result of the lawful discharges, had lost its representative status. Accordingly, the

Board dismissed the complaint in the foregoing respects (J.A. 205-206).[5]

III. The Decision of the Court Below

The court below concurred in all of the Board's findings of fact and conclusions of law, and affirmed the Board's order (Pet. 36-46). Rejecting petitioner's contention that termination of the contract by the company violated the Act, the court stated that (Pet. 39-40) the illegal "walkout was a material breach which justified the subsequent rescission of the contract by the Company," even if it were "assume[d] *arguendo* that the breach by UE was not in itself a complete termination of the contract." The court affirmed the Board's finding (Pet. 41-42) that the company had not violated the Act in discharging the employees who participated in the unprotected strike. With respect to petitioner's contention that certain employees, absent when the strike began, did not thereafter participate in the action and hence were unlawfully discharged by the company, the court found (Pet. 43) that the "question was one of fact, and there was evidence on the record as a whole to support the Board's conclusion" that "these employees * * * have acquiesced in, ratified, and become parties to their agent's action." The court further concluded that, since the "record supports

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[5] The Board found (J.A. 190-191) that the company violated the Act in various other respects and ordered appropriate remedial action. These findings are not in issue here, the company having complied with those parts of the order (Pet. 36).

a finding of ratification of the illegal strike activity as a factual matter," there was "no merit in [petitioner's] argument that the Board's decision * * * rested upon an inference of guilt from union membership" (Pet. 43). The court also rejected petitioner's claim that the discharges of these employees were discriminatorily motivated, and "not predicated upon the strike," stating that the "evidence does not support th[at] contention" (Pet. 42).

The court further concluded that the company's refusal to bargain on February 28 was not violative of the Act (Pet. 45). The court, rejecting petitioner's contrary contentions, found "supported by the record" the Board's conclusion that "on February 28 the Company had no notice of the termination of strike," and, in light of the legislative history of the Act, concurred with the Board's conclusion that the company, therefore, "was under no obligation to bargain" on that date (Pet. 44-45).

The court also affirmed the Board's findings that, with respect to the plant shutdown, the failure to recall previously laid-off employees, and subsequent refusals to bargain with the union, the company's actions were not discriminatorily motivated or violative of the Act (Pet. 43-44, 45-46).

ARGUMENT

1. The strike in the instant case, as the Board and the court below found, and petitioner concedes, was undertaken to compel modification of the currently effective bargaining contract, in violation of

the no-strike pledge (J.A. 157-158, 185-186, Pet. 12, 15, 40-41). The court below correctly concluded, affirming the Board, that in these circumstances the company was free to elect, as it did, to rescind the contract because of petitioner's prior material breach.

The decision fully accords with the settled rule, applicable to labor as well as other contracts, that "one party should not be required to perform if the other does not." *Restatement, Contracts* § 274, comment c.[6] A promise to refrain from striking "is the subject of considerable deliberation during contract negotiations and is often a concession for which the union exacts a substantial price from the employer." Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319, 330 (1951). The "assurance of uninterrupted operation during the term of the agreement" thus bargained for constitutes "[t]he chief advantage which an employer can reasonably expect from a collective labor agreement." S. Rept. No. 105, 80th Cong., 1st Sess., p. 16. Accordingly, the material breach of contract occasioned by a union's striking in derogation of a no-strike pledge clearly affords an employer who is himself blameless, as here, "a right of rescission" and leaves him free to declare his "election to terminate the entire labor relations contract."

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[6] Accord: 5 Williston, *Contracts*, §§ 1455, 1467 (Rev. Ed. 1937); *Boeing Airplane Co.* v. *I.A.M.*, 188 F. 2d 356, 357 C.A. 9), certiorari denied, 342 U.S. 821; *Boeing Airplane Company* v. *National Labor Relations Board*, 174 F. 2d 988, 990-991 (C.A. D.C.); *United Biscuit Co.* v. *National Labor Relations Board*, 128 F. 2d 771, 775 (C.A. 7).

Boeing Airplane Co. v. *I.A.M.*, 188 F. 2d 356, 357 (C.A. 9), affirming 91 F. Supp. 596, 608 (W.D. Wash.), certiorari denied, 342 U.S. 821.

Petitioner's contention (Pet. 12-17) that the company, despite the union's breach of the contract, could not rescind the agreement without first complying with Section 8(d) is insubstantial and presents no question warranting review by this Court.[7] That section is designed to afford parties to an existing collective bargaining agreement, when either seeks to modify or terminate it, an opportunity to negotiate a successor or modified contract, free from strike or lockout pressures for a prescribed period. The section clearly does not contemplate a situation where one party to such an agreement has committed a material breach which excuses the other from performance of its contractual obligations. The steps which Section 8(d) requires of a party seeking termination or modification of an existing agreement have no meaning in that situation. Thus, the section requires that the party seeking modification or termination shall continue in full force and effect all of the terms of the existing agreement for the prescribed period.

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[7] Neither *Mastro Plastics* v. *National Labor Relations Board*, No. 19, this Term, certiorari granted, 348 U.S. 910, nor *National Labor Relations Board* v. *Lion Oil Co.*, pending on petition for certiorari, No. 241, this Term, involves the question sought to be raised here. *Lion Oil* deals with the interpretation of the "waiting period" prescribed by Section 8(d) in a situation where that Section is clearly relevant. *Mastro Plastics* presents the question whether Section 8(d) applies to a strike called to protest an employer's unfair labor practices.

It also requires that such party offer to meet for the purpose of negotiating a new or modified contract. The machinery of Section 8(d) is thus geared to facilitating the orderly and peaceful renegotiation of contracts following notice of termination or modification. Obviously, that was not the situation here. And to give Section 8(d) the reading which petitioner urges, and require the employer in the instant case to adhere to the contract which the union had disregarded and offer to negotiate a successor agreement, would penalize the nonoffending party and permit the offending party to enjoy the benefits, and escape the obligations, of the agreement.[8] There is no rational basis for attributing such a purpose to Congress.

2. Petitioner further contends (Pet. 17-22) that the Board and the court below erred in finding that certain employees, not present at the plant when the strike was initiated, thereafter "acquiesced in, ratified, and bec[a]me parties" to the strike by "choosing to remain silent and taking no steps to disavow the action of their agent, despite the invitation from the Company to take such steps" (Pet. 42-43; J.A. 193-195). The question raised by peti-

[8] Petitioner's assertion (Pet. 15-16) that, under one suggested reading of Section 8(d), the union did not violate its provisions in calling the strike is self-defeating. For, if under that interpretation of Section 8(d), the union was not required to observe its requirements, by the same token neither was the employer, and petitioner's entire argument on this aspect of the case falls. Moreover, if Section 8(d) has any application to the instant case, petitioner, as the court below pointed out (Pet. 41), is hardly in a position to complain of the employer's failure to observe those requirements when the union itself ignored them.

tioner, as noted by the court below (Pet. 43), is merely "one of fact" and presents no issue warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491.

The Board's finding, moreover, is adequately supported by the record as a whole. "Silence under circumstances when, according to the ordinary experience and habits of men, one would naturally speak if he did not consent, is evidence from which assent may be inferred."[9] Here, despite the implicit invitation in the company's letter of February 29 to do so, it is undisputed that not one of the employees absent from the plant at 2 p.m. on February 28 ever advised the company that he did not concur in the group strike action undertaken by his bargaining agent; that he had not joined and made common cause with those who had walked out of the plant; or, even after the plant reopened, that he, as a "non-participant" in the strike, wished to return to work (*supra,* pp. 8-10). In these circumstances, it was wholly "consistent with legal principles" for the Board and the court "to consider the strike action as having been ratified" (*Hamilton Foundry & Machine Co.* v. *International Molders & Foundry Workers,* 193 F. 2d 209,

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[9] *Crane Co.* v. *James McHugh Sons, Inc.,* 108 F. 2d 55, 59 (C.A. 10); *Wittlin* v. *Giacalone,* 171 F. 2d 147, 148 (C.A. D.C.); *Standard Oil Co.* v. *Lyons,* 130 F. 2d 965, 968 (C.A. 8); *Leviten* v. *Bickley, Mandeville & Wimple,* 35 F. 2d 825, 827 (C.A. 2); *Restatement, Agency,* Secs. 82, 83, 93, comment a, 94, comment a, b, c, 95; Mechem, *Outlines of the Law of Agency,* Secs. 102, 105; *Restatement, Torts,* Secs. 780, 785(b).

215 (C.A. 6), certiorari denied, 343 U.S. 966). This finding, as the Board and the court found (Pet. 43, J.A. 193-194), is further buttressed by other circumstances. The company's employees at the time of the walkout were members of a firmly established union in the plant; the walkout called by the union received the complete support of the large group of employees who were in the plant when it took place; there is no showing in the record of dissent from any of the employees who were not present; indeed, many of these employees subsequently expressed their complete accord with their union's action.

There is thus no merit in petitioner's assertion (Pet. 17, 18, 20) that the decision below rests upon the "principle of 'guilt by association' " and that the employees were found to have participated in the strike "by virtue of the sole fact of their union membership." Nor is there any conflict with those decisions, cited by petitioner (Pet. 17, 20-21), establishing that an individual union member cannot be charged, without more, with the misconduct of either his union or his fellow members. The fact that these employees were all UE members was but one of the many factors taken into consideration by the Board in finding that they themselves also became participants in the strike by acquiescing in and ratifying their union's action.

Similarly, no conflict is presented, as petitioner suggests (Pet. 20, 22), by the decision of the Wisconsin Supreme Court affirming the ruling of a state commission that certain of the company's

employees were entitled to unemployment compensation under local law. *Marathon Electric Mfg. Corp.* v. *Industrial Commission, et al.*, 269 Wis. 394, 69 N.W. 2d 573. The state tribunals plainly "did not have under consideration the effect of the Labor Management Relations Act" in determining the unemployment compensation eligibility of these employees, "and for that reason the case does not present the same issue as is presented here." *National Labor Relations Board* v. *Deena Artware, Inc.*, 198 F. 2d 645, 653 (C.A. 6), certiorari denied, 345 U.S. 906. Nor could that decision, predicated upon a wholly different record and one in which the Board did not participate in any capacity, either bind the Board or detract from the substantiality of the evidence supporting its findings here. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 460; *United States* v. *Southern Pacific Co.*, 259 U.S. 214, 240; *United Brick & Clay Workers* v. *Deena Artware*, 198 F. 2d 637, 642-643 (C.A. 6), certiorari denied, 344 U.S. 897, rehearing denied, 344 U.S. 919.

3. Petitioner also urges (Pet. 23-27) that the court below erred in affirming the Board's holding (J.A. 198) that the company was under no obligation to bargain with UE on February 28 since the company had been given no notice that the illegal strike had been terminated. As noted by the court below (Pet. 44-45), the holding conforms to long established Board policy, effectuates express Congressional intent, and is clearly correct.

In the event of an illegal strike, the Board has consistently held that an employer has no duty to

bargain about the issues giving rise to the strike or the reinstatement of the strikers until notified that the strike has ended and the employees are willing to return to work.[10] Congress expressly approved as an "obviously * * * correct decision," which was "written into the Act" as amended, the Board's ruling in *Times Publishing Co.*, 72 NLRB 676, 683, that "a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude" a finding of a violation by the employer of his duty to bargain.[11] It can hardly be said that a union is seeking to "confer in good faith," as required by Section 8(d), when it seeks to compel an employer to bargain, as here, under the pressure of an illegal strike which, as far as the employer knows, is still in progress.

Contrary to petitioner's assertion (Pet. 24-25), the decision of the First Circuit in *National Labor Relations Board* v. *Highland Shoe, Inc.*, 119 F. 2d 218, is not inconsistent with the ruling below. The court there upheld the Board in its view that once employees have terminated an illegal strike and have returned to work, their employer is under a duty to bargain with their representative even though the previously existing contract was terminated by their unlawful action. 119 F. 2d at 220, 222, enforcing 23 NLRB 259, 268-273. The decision affords no support for petitioner's view

[10] *Higgins, Inc.*, 90 NLRB 184, 185; *Charles E. Reed & Co.*, 76 NLRB 548, 549-550; *Dorsey Trailers, Inc.*, 80 NLRB 478, 485-486, affirmed in relevant part, 179 F. 2d 589 (C.A. 5); *United Elastic Corp.*, 84 NLRB 768, 772.

[11] H. Rept. No. 245, 80th Cong., 1st Sess., pp. 27, 82. See also 93 Cong. Rec. 4363, 3641, 4766-4767.

that an employer is obligated to bargain when, as here, he has not even been notified that his employees are willing to abandon their illegal strike.

Petitioner's alternative claim (Pet. 26-27) that the company had notice on February 28 that the strike had terminated raises only a question of the sufficiency of the evidence to support the contrary conclusion reached by the Board (J.A. 198). The court below expressly found that the Board's "finding is supported by the record" (Pet. 45). "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 178. In any event, the Board's finding, sustained by the court below, is amply supported.[12] The very fact that petitioner twice contacted company representatives on February 28, but never mentioned that the illegal strike had been abandoned (*supra*, p. 8), demonstrates the insubstantiality of its present claim (Pet. 23) that the ruling below could in any way affect the "channel

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[12] Contrary to petitioner's suggestion (Pet. 26-27), the trial examiner, while finding that on February 28, UE, after being advised of the plant shutdown, had directed the employees to report, nowhere found that that fact had been communicated to the company by UE at any time it requested bargaining on that date (J.A. 158-159). Neither can the compliance by employees with UE's direction on the following day, February 29, supply the defect in notice, as petitioner further urges (Pet. 25-26), since their reporting, as the Board found (J.A. 194-195), fully comported with "a tactical maneuver on the part of UE" to continue the strike under the label of "lockout" and so shift the onus of its illegal conduct to the company (*supra*, pp. 5-6, 7-8).

of communication between an employer and the union" during an illegal strike.

4. Petitioner also contends (Pet. 28-31) that the Company's discharge of the strikers and failure to recall the laid-off workers was prompted by a discriminatory anti-union purpose and was not the consequence of the union's breach of contract. This purely evidentiary issue has been fully considered by the Court of Appeals, which found the Board's contrary conclusion "well grounded in the record" (Pet. 42). There is no occasion for further review.

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 343

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1113,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITIONER'S REPLY BRIEF

Argument

1) Contrary to the Board's position (Board Brief, pp. 16-17) the command which Section 8(d) lays on employers and unions alike is plainly apposite here. It does not destroy the right of rescission. It merely regulates and controls that right in the interest of industrial peace.

The contract here became one terminable at will by the Employer upon its breach. Its "expiration date" therefore was that date upon which notice of termination was given (March 5, 1952).[1] All that the Act then requires is that contract conditions already agreed to by the Employers be maintained for sixty days to permit the intervention of the appropriate mediation agencies in aid of the orderly and peaceful renegotiation of a new contract.

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[1] This would seem to be true both under Board doctrine, *Lion Oil Co.*, 109 NLRB 680, and the interpretation of the Eighth Circuit, *Lion Oil Co.* v. *NLRB* (C. A. 8), 221 F. 2d 231.

The limited restrictions of 8(d) do not "penalize" (Board Brief, p. 17) an employer by leaving it without effective means of self protection in the event of a strike in breach of contract. An employer has a remedy at law in state and federal courts for damages from any breach of contract. cf. *United Electrical, Radio and Machine Workers of America (UE)* v. *Oliver Corporation* (C. A. 8, 1953), 205 F. 2d 376. Meanwhile striking employees may be disciplined, subject to their right to protest the justice of such discipline through the grievance and arbitration procedure. *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 322. At the end of the sixty-day period, if good faith contract negotiations are unsatisfactory, an employer is relieved of any obligation under the contract.

In contrast to the reasonable limitations aimed at securing industrial peace which the Act lays upon the right of rescission the position of the Board would increase industrial conflict. The Board would permit an employer to bypass contractually established grievance and arbitration procedures for the settlement of disputes by immediate termination of the contract (cf. J. A. 122) and leave the discharged employees with no forum to settle the justice of their discharge except the picket line.

2) The discharge of the non-participants plainly presents a question of law. The men and women discharged here could not have been obliged to dissociate themselves from the Union's action unless the obligation sprang from the mere fact of their Union membership. As we have shown in our previous brief this is a novel doctrine of law presenting important questions which this Court should consider.

3) Moreover the Board can rely upon the employees' alleged failure to dissociate themselves from their union's action, and respond to the Employer's statement of Feb. 28, 1952 (Pet., p. 7), only by ignoring—as it does—the last paragraph of that statement which permitted a return to

work only upon plainly illegal conditions. Cf. *Stewart Die Casting Corp.* v. *NLRB* (C. A. 7), 114 F. 2d 849, cert. den. 312 U. S. 680. It is only by rejecting *sub silentio* the previously universal doctrine that an employer cannot force employees to choose between their livelihood and submission to illegal conditions of employment that the Board can maintain that question presented is merely one of fact.[2]

4) The Board is incorrect in its assertion (Board Brief, p. 22, fn. 12) that the Trial Examiner did not find that the Employer was notified on February 28, 1952 of the termination of the stoppage. Such a finding is plain from his crediting of the Union version of the Muelver-Gaines telephone conversation on that day (Pet., pp. 26-27). It is spelled out in his decision three times.[3] The failure of the Board to accept this finding made after hearing the evi-

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[2] The Board asserts (Board Brief, p. 18) that it is "undisputed" that each of the non-participants did not advise the Employer that they did not "concur" in the stoppage of February 28, 1952. This is incorrect. The record is silent on this question as to the great majority of the employees involved. There is however, a finding by the Board that the four watchmen—whom the Employer knew had taken no part in the stoppage—were nonetheless discharged because they refused to surrender their right to belong to the Union (J. A. 190).

[3] "Moreover, were it assumed *arguendo* that Respondent could have asserted that its appraisal of the situation at 2:40 P. M. was a reasonable one, its misapprehension would plainly have become apparent to it shortly after 4 P. M., when the Union's bargaining committee endeavored to confer with Keuchle, and later with Gaines and Wall, concerning the termination of the strike and the return of the employees" (J. A. 150-151).

* * * * * * *

"Aside from the foregoing, the strike by the participating employees ended upon the conclusion of the meeting and upon the Union's attempt to confer with Respondent's officials concerning the return of the employees" (J. A. 154).

* * * * * * *

"However, the strike was ended around 4 P. M. on February 28, by the direction to all employees to report for work on their regular shifts and by the Union's attempts through its bargaining committee to negotiate with management for the employees' return to work after the lockout" (J. A. 158).

dence raises sharply the question of Board compliance with the decision of this Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474.

Even were the Board correct this would only raise more sharply the question of whether an employer may punish all employees—innocent and guilty alike—by destroying the very mechanisms of collective bargaining and preventing receipt of notice of the termination of the stoppage.

5) In any event notice of the termination of the stoppage was plainly given on the morning of February 29, 1952, when the employees appeared at the plant gate ready for work. The Board's finding that the evidence showed that "the UE anticipated that the Respondent would be guilty of an illegal lockout under these circumstances" (J. A. 194) is directly rebutted by the findings of the Trial Examiner made after hearing the witnesses. He found as a fact that the Union did not deliberately stage the walkout "for the purpose of feinting it [the Employer] into a lockout" (J. A. 151, fn. 20).[4]

The Board's argument would damn the Union when it does and when it doesn't. On February 28th, the Board would hold the Union's approaches to the Employer insufficient because it chooses to regard them as equivocal. But on February 29th when the employees are unequivocal in their statement of desire to work the Board maintains that these actions "comport" (Board Brief, p. 22) with other motives. Plainly the Board has substituted speculation for

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[4] The Trial Examiner also made the following findings:

"For that matter, it does not appear that at the time of the walkout the Union had any formulated plan other than to hold a meeting and to decide therein what course to pursue" (J. A. 131).

* * * * * *

"However, the strike was ended around 4 P. M. on February 28, by the direction to all employees to report for work on their regular shifts and by the Union's attempts through its bargaining committee to negotiate with management for the employees' return to work after the lockout" (J. A. 158).

evidence as a basis for overruling findings of fact. Plainly too, the Employer was obligated both on February 28th, and 29th, to meet with the Union and by demonstrating his good faith put the good faith of the Union to the test of reality rather than hypothesis. Cf. *Times Publishing Co.*, 727 NLRB 676, 683.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 343

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1113,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REHEARING

The petitioner, United Electrical, Radio and Machine Workers of America, Local 1113, prays for a rehearing and reversal of the order of this Court entered on March 5, 1956, denying its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Intervening Circumstances

1. Subsequent to the Court's order of March 5, 1956, the Court has granted the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Lion Oil Co.* (Petition for Certiorari No. 241, October Term 1955). The instant case involves the same basic issues of the limitations imposed by Section 8(d) of the Act upon the right to strike as does the *Lion Oil* case. Petitioner should not be finally foreclosed by this Court until the *Lion Oil* case be decided.

In the *Lion Oil* case the union there involved sought modification of the contract and struck during the term of the contract, and at the time when the contract itself provided for submission of proposed amendments to the contract. The Court of Appeals for the Eighth Circuit (reaffirming its interpretation of Section 8(d) in *Local No. 3, United Packinghouse Workers of America, CIO* v. *N. L. R. B.*, 210 F. 2d 325) held that the provisions of Section 8(d) forbade any strike during a contract term until the terminal date of the contract, and that the striking employees were not entitled to reinstatement. Likewise, in the instant case, the Union and the Employer had entered into bargaining on modification of the contract during the contract term. The Court below here, held likewise, that the strike was prohibited by Section 8(d), and that the strikers were not entitled to an employee status under the Act.[1] Both this case and *Lion Oil,* therefore, present the same basic issue of how, if at all, the provisions of Section 8(d) limit the right of employees to seek modification of their contract and to strike during its term.

2. Prior interpretations of Section 8(d) by the Board and lower courts have taken at least four positions on the question of when in a contract relationship the restrictions of Section 8(d) apply. Only two of these interpretations will be presented to the Court by the parties in *N. L. R. B.* v. *Lion Oil Co.* The Court will thus not have available to it full exposition of all facets of the argument unless certiorari be granted here and this case joined with *Lion Oil* for argument.

In the Board's first interpretation of the Section 8(d) proviso, three members of the Board held that Section 8(d) did not restrict the right to strike during the contract term provided the notices required by that Section were given.

[1] The interpretation of Section 8(d) in this case had even more far-reaching implications than in *Lion Oil,* since the court below held that the Union violation released the Employer from its own obligations under Section 8(d) of the Act.

United Packinghouse Workers of America, 89 N. L. R. B. 310. (This position was followed by Board Member Peterson in *Lion Oil Co.,* 109 N. L. R. B. 680.) The two remaining Board members (Chairman Herzog and Member Murdock) interpreted Section 8(d) as only restricting the right to strike at the end of the contract term and having no application to strikes during the contract. (This position was adhered to by Board Member Murdock in the *Lion Oil* case). In *Lion Oil Co.,* however, a majority composed of new members of the Board reversed the Board's previous position and held that the limitations of the 8(d) proviso prevented any strike except when the contract itself envisaged contract modification or termination. The Court of Appeals for the Eighth Circuit (both in *Lion Oil* v. *N. L. R. B.* (C. A. 8, 1955), 221 F. 2d 331 and previously in *United Packinghouse Workers of America, Local 3* v. *N. L. R. B.* (C. A. 8, 1954), 210 F. 2d 325), has held that Section 8(d) forbids all strikes until the termination date of the contract, regardless of previous collective bargaining negotiations. There, thus exist four relevant interpretations of the limitations which Section 8(d) places upon the right to strike.

1) The Section forbids all strikes until the end of the contract term.[2]

2) The Section forbids all strikes except at the end of the contract or at a time when the contract itself envisages modifications.[3]

3) The Section does not restrict strikes at any time during a contract term, provided only that a proper notice be given.[4]

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[2] *United Packinghouse Workers of America, Local 3* v. *N. L. R. B.* (C. A. 8, 1954), 210 F. 2d 325; *Lion Oil Co.* v. *N. L. R. B.* (C. A. 8, 1955), 221 F. 2d 331.

[3] *Lion Oil Co.,* 109 N. L. R. B. 680.

[4] *United Packinghouse Workers of America,* 89 N. L. R. B. 310.

4) The Section forbids strikes only in the sixty days immediately prior to the terminal date of the contract.[5]

The present alignment of parties before this Court in *Lion Oil* is such as to insure adequate presentation to this Court only of the arguments supporting the majority opinion of the present Board and of the Court of Appeals for the Eighth Circuit. Should the Oil Worker's International Union intervene in that case, it might be speculated that they would present the argument for the position of the Board majority in *United Packinghouse Workers of America.* No party, however, has adopted as its own the interpretation given the Section by Chairman Herzog and Board Member Murdock. Of the parties presently raising the question before the Court only the Petitioner here is committed to their interpretation of Section 8(d) by the facts of its case and obligated by the pressures of litigation to present it fully and completely to this Court.

It cannot be maintained that this interpretation of the Act is not entitled to consideration. The opinion of Chairman Herzog and Member Murdock show that it is amply grounded in the history and purpose of the Act. Chairman Herzog was Chairman of the Board while the 1947 Amendments were under consideration and enacted. Board Member Murdock brought to the Board his previous experience as a Senator in 1940-1946, a period when Congress had under consideration a number of proposals which were later incorporated in or influenced the 1947 Amendments. The logic of their position was adopted by Judge Swan in *N.L.R.B.* v. *Mastro Plastics Corp.,* 214 F. 2d 462.[6] It is deserving of presentation to this Court.

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[5] Chairman Herzog and Member Murdock in *United Packinghouse Workers of America,* 89 N. L. R. B. 310.

[6] This Court's subsequent reversal of that case (*Mastro Plastics* v. *N. L. R. B.,* No. 241, October Term 1955) did not deal with the question of when Section 8(d) might apply temporally.

Other Substantial Grounds for Writ of Certiorari

3. The opinion below raises an important question under the National Labor Relations Act as to the relationship which the Act creates between unions and the workers whom they represent under the Act. The Court below adopted the Board finding as urged before it that the discharged non-participating employees ratified the walkout by failing to repudiate the action of their statutory collective bargaining agent (J. A. 193-194, Petition, App. B, p. 43). The decision below thus departs from the common law rules of agency which require that a purported agency relationship exist before ratification by silence of an agent's misconduct be inferred [7] and creates a unique statutory agency under the National Labor Relations Act between the statutory collective bargaining representative under Section 9(a) of the Act and the employees whom it represents.[8]

The decision below thus raises the following question for determination by this Court:

> "Does Section 9(a) of the National Labor Relations Act create a relationship between employees and their collective bargaining representative whereby the employee is presumptively responsible for misconduct of that representative in dealing with the employer?"

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[7] Mechem, Outlines of the Law of Agency, p. 75 (3d Ed. 1923); Restatement, Agency Section 85(1).

[8] The union membership of the non-participants does not permit of the conclusion that the Court below might merely have misapplied common law rules of agency. The union membership here was compelled by contract under the provisions of Section 8(a)(3) of the Act. Union membership in such circumstances is merely an extension of the statutory collective bargaining relationship established by Section 9(a) of the Act. By the terms of Section 8(a)(3), a union shop is permitted only to the collective bargaining representative under Section 9(a) of the Act and the obligations of union membership are confined to the payment of dues.

This Court has in the past ruled on questions dealing with the authority of the statutory collective bargaining representative to bind the employees contractually. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Aeronautical Industrial District Lodge* v. *Campbell*, 337 U. S. 521. The question here presents an equally important facet of this problem which vitally affects the millions of American workers subject to the jurisdiction of the Act and which has not been, but should be, settled by this Court. For, if employees are to be made liable for all acts of their collective bargaining representative, vis-a-vis their employer, then willy-nilly their right to refrain from concerted action guaranteed them by Section 7 of the Act becomes meaningless.

The Act itself indicates a Congressional purpose not to impose corporate personal responsibility upon the members of the bargaining unit for all the acts of their bargaining agent. Section 2(13) of the Act incorporates the common law doctrines of agency into the Act.[9] And, in any suit under Sections 301(a) or 303 of the Act, recovery may only be had from the union treasury and a judgment "is not enforceable against any individual member or his assets." Section 301(b). If Congress did not intend to extend the responsibility of individual members for union acts beyond common law limits, then, a fortiori, it did not intend to extend the previous limits of vicarious responsibility to include responsibility of all employees in the bargaining unit for the acts of their collective bargaining representative.

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[9] "[B]oth employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency * * *" H. Conf. Rep. No. 510, 80th Cong. 1st Session, 36 in 1 Legislative History of the Labor Management Relations Act, 540.

CONCLUSION

The Petition for rehearing should be granted, the Court's order of March 5, 1956 vacated, and a writ of certiorari issued to the United States Court of Appeals for the District of Columbia Circuit.

In the alternative this Court should stay the determination of this Petition pending the decision in *National Labor Relations Board* v. *Lion Oil Co.*

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

DAVID SCRIBNER.